COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2416 **Cir. Ct. No. 2011CV437**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ESTATE OF LIELA READ, DECEASED, BY WILLIAM R. READ, AS PERSONAL REPRESENTATIVE,

PLAINTIFF-RESPONDENT,

V.

SHEILA R. KRONBERG,

DEFENDANT-CO-APPELLANT,

PAMELA R. MILLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. This appeal involves a dispute between, on one side, sisters Pamela Millen and Sheila Kronberg, and on the other, the Estate of their late mother, Liela Read, concerning a parcel of real property. The Estate filed this action against the two sisters for a declaration of interest in the property. The sisters argue that the circuit court erred when it determined that their mother, before her death, did not validly gift to them her interest in the parcel through a quit claim deed that the mother executed in favor of both sisters and gave to one of them. Instead, the court concluded, the interest in the parcel belongs to the Estate because it was not validly gifted for multiple reasons, including that Liela did not deliver the deed to Millen and Kronberg with the intent to convey her interest in the property to them. The sisters also argue that the court erred in allowing the Estate to amend its complaint to include a challenge to the validity of the quit claim deed *as an inter vivos gift* to the sisters, which they allege includes additional elements unrelated to the issue pled in the complaint as to whether the deed was valid. They also argue that this action is barred under the doctrines of claim and issue preclusion.

¶2 We conclude that the Estate is not precluded from bringing this action. We also affirm the circuit court's decision that the Estate is the owner of the property on the ground that Liela did not deliver the deed to Millen with the intent to convey title to Millen and Kronberg. Because Millen and Kronberg concede that the issue of delivery with intent to convey title was properly pled in the Estate's complaint, we need not determine whether the circuit court erred in amending the pleadings to include any additional elements relevant to the issue of whether the deed was valid as an inter vivos gift.

BACKGROUND

¶3 The following factual background is taken from the findings of the circuit court, which are not in dispute.

¶4 Liela Read had five children: Sheila Kronberg, Pamela Millen, Christine Grebe, William Read, and Brian Read.[1] In 1992, Liela acquired a parcel of property, which is the only parcel at issue in this appeal. In conveyances that are not challenged in this appeal, Liela deeded to some of her children percentage interests in this property, leaving Liela, as of 2001, with a retained 55.5% interest. For ease of reference, we generally refer to this 55.5% interest as the "Liela property interest."

¶5 In 2001, Liela executed a will directing that, upon her death, her remaining interest in the property at that time was to be sold and the proceeds distributed to her grandchildren. After executing this will, Liela took up residence with Kronberg in Indiana due to physical limitations.

¶6 Liela and Kronberg had a history of significant disputes over money. This was known to brothers William and Brian, to whom Liela had given a durable power of attorney. Because of this history, the brothers created an irrevocable trust with the intention of protecting Liela's assets. The brothers created this trust purportedly under authority granted to them by Liela in the durable power of attorney, but without Liela's specific authorization to do so. As explained further below, Liela would later challenge the validity of this trust. William and Brian transferred the Liela property interest to this trust in June 2001.

[1] We use first names to refer to those who share a surname.

¶7 In July 2003, the trust listed the property for sale. When Liela discovered this attempt to sell the property, she went to the property with Millen, removed the "for sale" signs, and replaced them with "no trespassing" signs.

¶8 About a week later, with assistance from Millen, Liela as grantor completed a quit claim deed for the property. This deed listed Millen and Kronberg as the grantees and purported to convey to them "an undivided 55.5% interest as tenant[s] in common." The deed was signed by Liela and notarized on July 26, 2003. A few days later, Liela gave the deed to Millen and told her to "keep it" or "put it away." Millen later testified that she "put the quit claim deed in a drawer and then forgot all about it" until March 2005, when she had it recorded, as explained further below.

¶9 In the meantime, during an August 2003 incident, Liela called the police for assistance in removing William, Brian, and Grebe from the property. At that time, Liela told an officer that she owned the property.

¶10 Still in August 2003, Liela commenced an action in Milwaukee County circuit court seeking a declaration that the trust William and Brian had set up was not valid. In July 2004, the court in the Milwaukee action held that the trust was not valid, because the durable power of attorney that Liela had granted to William and Brian did not "contain a specific grant of authority … to create an irrevocable trust." Based on this conclusion that the trust was not valid, the court determined that the transfer of the Liela property interest to the trust was "void," and that this property was to be "restored to" Liela. During January and February 2005, William negotiated with Liela in an attempt to purchase her interest in the property from her.

¶11 As referenced above, it was not until March 2005 that Millen recorded the quit claim deed that Liela had signed in July 2003.

¶12 Liela died in September 2005 in Indiana, where a probate action was initiated. William served as personal representative of the Estate, which was eventually closed as insolvent. Because the quit claim deed had been recorded by that time and its validity had not been challenged, the property was not considered an asset of Liela's Estate during probate.

¶13 After the Estate was closed, the property was the subject of a number of lawsuits among Liela's descendants. Two lawsuits filed in Oneida County, Wisconsin—one filed by William alone, the other by William, Grebe, and Millen—alleged that Kronberg failed to pay her portion of taxes on the property. In at least one of these lawsuits, Kronberg took the position that she had no ownership interest in the property. The circuit court in each case determined that Kronberg had an interest in the property by virtue of the recorded quit claim deed and ordered her to pay a portion of the property taxes.

¶14 In 2011, William, as personal representative of the Estate, filed this lawsuit against Millen and Kronberg, seeking a declaration, pursuant to WIS. STAT. § 841.01 (2013-14)[2] (declaration of interest in real property), that the Estate owns the Liela property interest.

¶15 In this action, the Estate alleged in pertinent part the following in its complaint against Millen and Kronberg: (1) when Liela executed the deed, the

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

interest that it "purported to convey was held in the Irrevocable Trust" and therefore Liela "had no interest in" the property; (2) in the alternative, even if Liela had an interest in the property that "could have been transferred" by the deed, the deed was "invalid" and not signed by Liela.

¶16 After a bench trial, the circuit court held that the Estate, and not Millen and Kronberg, owns the Liela property interest, based on determinations that included the following. First, despite the fact that the Estate did not allege in the complaint that the property had not been validly gifted through the quit claim deed, this issue was "tried in this case with the express or implied consent of the parties" and the complaint would be considered amended to include this valid gift issue. Second, the Estate's action was not barred on the basis of issue or claim preclusion. Third, Liela had the authority to transfer her interest in the property to Millen and Kronberg on July 26, 2003, but she did not validly gift this interest through the quit claim deed. Fourth, Liela did not transfer her interest in the property to Millen and Kronberg by way of any lawful conveyance other than the quit claim deed. Millen and Kronberg now appeal.[3]

[3] Before addressing the arguments of the parties, we observe at the outset that counsel for Millen and Kronberg inappropriately add to the work of opposing counsel, the judges and staff of this court, and any other person attempting to follow their arguments on appeal by consistently failing to cite to portions of the record throughout the Argument section of their brief. This needlessly risks generating misunderstanding and confusion and disregards the mandatory rule that they include "citations to … parts of the record relied on." *See* WIS. STAT. § 809.19(1)(e).

DISCUSSION

I. Preclusion

¶17 Millen and Kronberg argue that the Estate is precluded from bringing this action because the issue of whether Millen and Kronberg own an interest in the property was litigated and resolved in their favor in the Oneida County lawsuits referenced above, and William Read was a party to both lawsuits. We reject this argument on the ground that William, the party to the Oneida County lawsuits, is not in privity with and does not share an identity of interest with the Estate, the party to this lawsuit.

¶18 The burden of proving preclusion falls on the party asserting it. *See* ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72 (burden for claim preclusion); ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999) (burden for issue preclusion).

A. Claim Preclusion

¶19 Under the doctrine of claim preclusion, "'a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***Pasko***, 252 Wis. 2d 1, ¶14 (quoted source omitted). Claim preclusion has three elements, each of which must be met: "'(1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits.'" ***Kruckenberg v. Harvey***, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879 (quoted source omitted).

¶20 We address only the first element, because we conclude that Millen and Kronberg fail to meet their burden on this element. William and the Estate are not the same party and, thus, the question is whether they are in privity. This is a question of law that we review de novo. *See* ***Pasko***, 252 Wis. 2d 1, ¶16.

¶21 "Privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved." ***Id.*** In his individual capacity, William's interest in the previous Oneida County lawsuits was to avoid delinquent taxes on the property, a portion of which he personally owed. In this lawsuit, in contrast, the Estate's interest is to ensure that the beneficiaries of the Estate receive the shares of the property, or the proceeds from its sale, to which they are entitled. The circuit court found that William is not a beneficiary of the Estate relative to the Liela property interest, and Millen and Kronberg do not contest this factual finding. Thus, William in his individual capacity did not represent """"the same legal interest""" as the Estate now seeks to enforce and privity does not exist here. *See* ***id.***, ¶18 (quoted sources omitted).

¶22 In support of their assertion that, by virtue of the fact that he is the representative of the Estate, William is "in privity with himself as an individual in the previous actions," Millen and Kronberg cite ***Landess v. Schmidt***, 115 Wis. 2d 186, 195-97, 340 N.W.2d 213 (Ct. App. 1983) (employers are generally in privity with employees based on "vicariously responsibil[ity]"), and ***Virnich v. Vorwald***, 664 F.3d 206, 216 (7th Cir. 2011) (company owners are generally in privity with their companies). However, Millen and Kronberg fail to explain how either case applies to the scenario here, which does not involve employment or company ownership.

¶23 Moreover, legal authority supports the Estate's contrary argument that claim preclusion does not apply to a person who appears in different legal capacities in different lawsuits. *See, e.g.*, ***Stoll v. Mutual Ben. Life Ins. Co.***, 115 Wis. 558, 565, 92 N.W.2d 277 (1902) ("Stoll as guardian is a different person entirely from Stoll as executor. In the latter capacity he is neither the same party as in the former nor in privity with him."); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 36(2) (1982) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata [claim preclusion] in a subsequent action in which he appears in another capacity.").[4]

B. Issue Preclusion

¶24 Issue preclusion "'is designed to limit the relitigation of issues that have been actually litigated in a previous action.'" ***Paige K.B.***, 226 Wis. 2d at 219 (quoted source omitted). Issue preclusion is applied in a two-step analysis. ***Id.*** at 224. The first step asks whether "the issue in both actions is the same and has actually been litigated and the party against whom preclusion is asserted was a party, in privity with a party, or had sufficient identity of interest with a party in the previous litigation." ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485; ***Paige K.B.***, 226 Wis. 2d at 224-25. These are questions of law that we review de novo. *See* ***Miller***, 274 Wis. 2d 471, ¶20; ***Paige K.B.***, 226 Wis. 2d at 224-25. If these questions are answered in the affirmative, the circuit court "is to apply various factors to decide if the application of the doctrine [of

[4] Wisconsin courts look to the RESTATEMENT (SECOND) OF JUDGMENTS (1982) for guidance in deciding questions related to preclusion. *See* ***Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶48 n.24, 300 Wis. 2d 1, 728 N.W.2d 693.

issue preclusion] is fundamentally fair." ***Miller***, 274 Wis. 2d 471, ¶19. We need not address this second step, because we conclude that Millen and Kronberg fail to meet their burden on the first step.

¶25 Millen and Kronberg argue that the validity of the quit claim deed was actually litigated in the Oneida County actions. An issue is "actually litigated" when "it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" ***Randall v. Felt***, 2002 WI App 157, ¶9, 256 Wis. 2d 563, 647 N.W.2d 373 (quoted source omitted).

¶26 As a potential threshold concern, we note that Millen and Kronberg, the appellants here, have caused to be filed with the appellate record only portions of the records from the Oneida County actions. Without the full record of those previous actions, we question whether we have a complete picture of whether the validity of the quit claim deed was an issue that was "actually litigated," and it appears that their argument fails on this ground.

¶27 However, our basis for rejecting this argument is that Millen and Kronberg fail to persuade us that William and the Estate, who we have already explained are not in privity, have such a "sufficient identity of interest" that the Estate is precluded from bringing the instant action. ***Miller***, 274 Wis. 2d 471, ¶19. "A litigant has a sufficient identity of interest with a party to a prior proceeding if the litigant's interests in the prior case can be deemed to have been litigated." ***Paige K.B.***, 226 Wis. 2d at 226. Furthermore, "[w]ith respect to issue preclusion, a party appearing in successive actions in the same capacity is subject to [issue preclusion] but is not precluded where the capacities in which he participated are different." RESTATEMENT (SECOND) OF JUDGMENTS § 36 cmt. a.

¶28 We conclude that the Estate's interests cannot be deemed to have been litigated in the prior Oneida County lawsuits. As we explained in regard to claim preclusion, William's interest in those cases was to compel Kronberg to pay her alleged share of taxes on the property in order to avoid delinquency. In contrast, the Estate's interest here is to ensure that the beneficiaries of the Estate receive the share of the property to which they are allegedly entitled by proving that Liela did not validly convey her property interest to Millen and Kronberg. The Estate's interest was not litigated in the Oneida County cases. Accordingly, there is no identity of interest.

¶29 Millen and Kronberg do not present us with a supported argument as to why we should conclude, to the contrary, that William and the Estate share an identity of interest. They cite ***Manu-Tronics, Inc. v. Effective Management Systems, Inc.***, 163 Wis. 2d 304, 471 N.W.2d 263 (Ct. App. 1991), for the proposition that issue preclusion does not require an identity of parties. We disagree that ***Manu-Tronics*** is pertinent precedent. In that case, this court explained that issue preclusion "does not require an identity of parties if it is raised defensively to prevent Manu-Tronics [the plaintiff in both actions] from relitigating an issue or issues conclusively resolved against it in the arbitration proceeding." ***Id.*** at 316. Unlike in ***Manu-Tronics***, the Estate, the plaintiff in this case, is not attempting to relitigate issues already decided against it in an action to which it was a party. The Estate was not a party to the Oneida County cases.[5]

[5] Millen and Kronberg also argue that "[i]f the Estate had an interest in determining ownership of the 55.5% interest in the property, then it was a necessary party to those earlier actions and should have been joined pursuant to [WIS. STAT.] § 803.03(1)." Millen and Kronberg then quote from this statute, but they fail to develop an argument explaining a joinder theory based on pertinent legal authority. Moreover, Millen and Kronberg do not point to any place in the record where they made this joinder argument before the circuit court. We reject this (continued)

II. Validity of the Quit Claim Deed

¶30 The circuit court determined that the quit claim deed was not a valid inter vivos gift because Liela did not deliver the deed to Millen with the intent that it convey title to Millen and Kronberg and because Liela never gave up dominion over the property, both elements of a valid inter vivos gift.[6] Millen and Kronberg argue that these findings were in error. We now explain why we affirm the circuit court's decision on the ground that Liela did not deliver the deed to Millen with the intent that it convey title, which, as we explain, is also an element of a valid deed, in addition to being an element of a valid gift.

¶31 We make two observations that focus the issues we will address regarding the elements of the two claims as to the validity of the deed itself and as a gift. The first observation involves a legal point that is fundamental in this case involving an alleged gift of a deed. As far as the parties argue the issues, and we believe under settled law, in order to find either (1) that a deed is valid, or (2) that a gift of real estate through a deed is valid, one shared required element in each

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argument as both undeveloped and forfeited. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838 ("'The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court.'" (quoted source omitted)).

Separately, in Millen's reply brief on appeal, she argues that the Estate is judicially estopped from raising the issues presented on appeal. Millen did not make this argument in her brief-in-chief. Issues raised for the first time in a reply brief are forfeited. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

[6] In order to constitute a valid inter vivos gift, the alleged donee has the burden of establishing the following elements: "'(1) intention to give on the part of the donor; (2) delivery, actual or constructive, to the donee; (3) termination of the donor's dominion over the subject of the gift; and (4) dominion in the donee.'" ***Giese v. Reist***, 91 Wis. 2d 209, 218, 281 N.W.2d 86 (1979) (quoted source omitted).

case is that the deed was delivered *with intent to convey title*.[7] Thus, seen in either the valid gift or the valid deed context, Liela's intent to convey title is a necessary element. As explained below, it is this shared legal element that we conclude is lacking here, and since it is an essential element, this settles the issue.

¶32 Our second initial observation involves one element in the valid gift context, namely, dominion. The court found that Liela did not surrender dominion and Millen and Kronberg did not exercise dominion over the Liela property interest. Millen and Kronberg argue that the court misapplied the law in making these findings by considering whether Liela had surrendered dominion over the property, rather than whether she had surrendered dominion over the deed to the property. However, we need not, and do not, address this issue, because, to repeat, we conclude that at least one element necessary to constitute a valid deed or gift is lacking here, namely, delivery with intent to convey title.[8]

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[7] A gift must be "'deliver[ed] … by the donor with intention to part with his interest in and over the property given,'" ***Potts v. Garionis***, 127 Wis. 2d 47, 51, 377 N.W.2d 204 (Ct. App. 1985) (quoted source omitted), and a deed does not transfer title unless it is "delivered" to a grantee with the intent that it convey title to the deeded property. *See* ***Curry v. Colburn***, 99 Wis. 319, 320, 74 N.W. 778 (1898) ("The question of delivery is largely of intention,… [a]nd a deed never becomes operative until it is delivered with the intent that it shall become effective as a conveyance." (citations omitted)); AM. JUR. 2D *Deeds* § 106 ("When the evidence establishes that the property owner does not intend to pass a present interest in the property, then as between the parties there is no binding delivery even though the deed is recorded.").

[8] As referenced above, Millen and Kronberg also argue that the circuit court erred in finding that they had impliedly consented to trial on the issue of dominion, as part of an inquiry into whether the deed was valid as an inter vivos gift, in addition to the issue pled in the complaint as to whether the deed was valid. However, we need not decide this issue because Millen and Kronberg concede that the issue of whether the deed was delivered to Millen with intent to convey title was properly pled, as an element of a valid deed, and we conclude that this issue is dispositive.

¶33 Having refined the issues we will address, we turn to whether Liela delivered the deed to Millen with intent to convey title to Millen and Kronberg. Whether a deed has been delivered with the intent that it convey title to the grantee is a question of fact, and the circuit court's finding as to that fact will not be overturned if there is credible evidence to uphold it. ***Herzing v. Hess***, 263 Wis. 617, 621, 625, 58 N.W.2d 430 (1953). However, the "[p]ossession of a deed by the grantee raises a presumption that it was delivered to her to take effect according to its terms at the time of its execution." ***Id.*** at 619. "This presumption must be rebutted by clear and satisfactory evidence." ***Id.*** at 624.

¶34 The circuit court found that Liela executed and then transferred physical possession of the deed to Millen, but that, despite these facts, the evidence established that Liela did not do so with the intent to transfer title to anyone. Supporting this finding regarding Liela's intent are the following. As summarized above, shortly after Millen told Liela that the property had been listed for sale, Liela and Millen took down the "for sale" signs and put up "no trespassing" signs. Approximately one week later, Liela, with Millen's assistance, obtained and filled out the quit claim deed. Liela did not retain an attorney to draft this quit claim deed, as she had done for previous gifts of interest in this property. A few days after that, Liela gave the deed to Millen, telling Millen to "keep it" or "put it away," and asking Millen not to tell anyone about it. By Millen's own admission, Liela's intention in giving the deed to Millen was that it "be used as a tool to stop the potential sale of the property." Shortly after giving the deed to Millen, Liela represented to a police officer that she owned the property, not that Millen and Kronberg owned it. Two days later, Liela commenced the action in Milwaukee County seeking a declaration that the trust was not valid and all transactions conveying assets to it were void. As the circuit court explained in this

case, "after supposedly gifting her interest in the property to Millen and Kronberg, Liela … started a court action in Milwaukee County for the express purpose of regaining her interest in the property" from the trust. Liela continued to pay "bills and expenses related to the property until her death," and in January and February 2005, Liela negotiated with William Read to purchase her interest in the property.

¶35 If Millen and Kronberg mean to argue that these factual findings are erroneous, they do not develop this argument with citation to the record. They do develop an argument, however, that the only reasonable inference that can be drawn from these facts is that Liela intended to convey the property to Millen and Kronberg with a condition not stated on the deed, namely, that the deed "be held for some undefined purpose to be used as a tool to prevent sale of the … property." This is problematic, they argue, because of a legal principle that the circuit court should have applied here.

¶36 This legal principle is that Wisconsin law does not recognize a grantor's oral condition purporting to limit operation of a deed at the time of delivery to a grantee: "Wisconsin law has made clear that if a party wants to retain an interest in property, it must expressly do so in the document of conveyance." ***Wynhoff v. Vogt***, 2000 WI App 57, ¶17, 233 Wis. 2d 673, 608 N.W.2d 400. """[A]s a matter of law there cannot be a conditional delivery of a deed to a grantee; in such a case the delivery becomes absolute."" ***Id.*** (quoted sources omitted); *see also* ***Herzing***, 263 Wis. at 622-23 ("If there was some condition annexed to the delivery it becomes immaterial.").

¶37 To summarize, then, according to Millen and Kronberg, the only reasonable reading of the undisputed facts is that the deed validly transferred the Liela property interest to Millen and Kronberg when Liela gave it to Millen, and

any condition purportedly attached to the deed but not included on the face of the deed is immaterial. This would include the condition that Liela intended to retain ownership of the property unless transfer to Millen and Kronberg was necessary to frustrate sale of the property by Liela's other children.

¶38 We reject Millen and Kronberg's argument on the ground that this is not the only reasonable inference from the undisputed facts. Another reasonable inference from the factual findings presented above, an inference the circuit court drew, is that there is clear and convincing proof that Liela never intended the deed to become operative. Particularly persuasive on this point are the facts that Liela did not retain an attorney to draft the deed, that she told Millen to "put it away" after Liela gave it to Millen, and that Liela asked Millen not to tell anyone about the deed. "We must accept a reasonable inference drawn by a trial court from established facts if more than one reasonable inference may be drawn." ***Potts v. Garionis***, 127 Wis. 2d 47, 54, 377 N.W.2d 204 (Ct. App. 1985).

¶39 In sum, we agree with the circuit court that, as a matter of law, the facts presented above and reasonable inferences drawn therefrom provide clear and convincing evidence to rebut the presumption created by Liela's creation and passing of the deed to Millen that Liela intended to convey her interest in the property to Millen and Kronberg through the deed.

¶40 Millen and Kronberg also argue that the circuit court improperly applied the law in its finding on intent by considering testimony regarding actions or statements of family members around the time Liela executed the quit claim deed and gave it to Millen, rather than relying solely on what was contained within the four corners of the quit claim deed. To support this argument, Millen and

Kronberg rely on ***Wynhoff***, ***Ritchie v. Davis***, 26 Wis. 2d 636, 133 N.W.2d 312 (1965), and ***Herzing***. This argument fails for at least three reasons.

¶41 First, Millen and Kronberg rely on a passage from ***Wynhoff***, quoting ***Ritchie***, that does not apply here. In ***Wynhoff***, the court stated, "'once the deed takes effect as of date of delivery, subsequent conduct or remarks of the grantor cannot operate retroactively to change such effect.'" 233 Wis. 2d 673, ¶17 (quoting ***Ritchie***, 26 Wis. 2d at 644). While broadly worded, this passage from ***Wynhoff*** is not applicable to the issue presented here, at least as far as Millen and Kronberg tell us. As we have explained, the issue is whether the Liela property interest was *ever* validly conveyed to Millen and Kronberg, given the evidence described above regarding Liela's intent, not whether Liela attempted to attach an unknown condition to the deed after the property interest was validly conveyed.

¶42 Second, even if we attempt to construe Millen and Kronberg's argument that the circuit court erred in looking outside the four corners of the deed to resolve the issue presented here, this argument is in conflict with case law, explained above and cited in appellate briefing by Millen and Kronberg, that possession of a deed *raises the rebuttable presumption* that it was delivered with the intent that it take effect. *See* ***Herzing***, 263 Wis. at 619. Millen and Kronberg's argument is, in essence, that the content of the deed creates an *irrebuttable* presumption of an intent to transfer title to the grantee, directly contrary to the *rebuttable* presumption clearly defined in ***Herzing***. Millen and Kronberg make no effort to reconcile their current theory with the rule stated in that case.

¶43 Third, contrary to the approach advanced by Millen and Kronberg that the inquiry into the intent of a grantor is limited to the four corners of a deed, the courts in both ***Ritchie*** and ***Herzing*** explicitly considered statements and

actions of the grantors in order to determine whether there was any credible evidence to support the circuit court's determination regarding intent. *See* ***Ritchie***, 26 Wis. 2d at 643, 645 (statements of grantor at time of delivery and thereafter relevant to intent); ***Herzing***, 263 Wis. 620-25 (evidence of grantee and grantor's actions and statements upon delivery and thereafter was insufficient to rebut presumption of intent created by grantees' possession of the deed).

¶44 In sum, Millen and Kronberg fail to persuade us that the circuit court's finding that Liela did not deliver the deed with an intent to convey her interest in the property is clearly erroneous or based on an incorrect application of the law.

CONCLUSION

¶45 For the forgoing reasons, we affirm the decision of the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.